

First Supplement to Memorandum 79-2

Subject: Study D-900 - Wage Garnishment Procedure

Attached to this memorandum are letters from the following entities, all either opposed to or having problems with major aspects of the tentative recommendation to eliminate the levying officer and use of first-class mail:

Shell Oil Company (Exhibit 1) (objects to use of ordinary mail in lieu of certified mail)

Los Angeles County Clerk (Exhibit 2) (generally opposed)

Southeast Legal Aid Center (Exhibit 3) (generally supports tentative recommendation but raises technical objection)

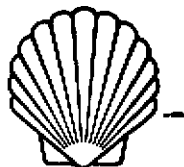
Western Center of Law and Poverty (Exhibit 4) (opposes elimination of levying officer)

Marshall's Association (Exhibit 5) (strongly opposed)

In addition, Michael E. Barber, supervising deputy of the domestic relations division of the Sacramento County District Attorney, opposes elimination of the levying officer. See Exhibit 1 of First Supplement to Memorandum 79-5 (Confessions of Judgment).

Respectfully submitted,

John H. DeMouilly
Executive Secretary



SHELL OIL COMPANY

P. O. BOX 4848
511 N. BROOKHURST STREET
ANAHEIM, CALIFORNIA 92803

January 23, 1979

Subject: Tentative Recommendation
Relating to Employees'
Earnings Protection Law

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

We have reviewed the subject tentative recommendation dated November 1978 and, while we appreciate that service of an earnings withholding order by first-class mail may slightly reduce the cost to the creditors inherent in wage garnishment procedures, the proposals made in the tentative recommendation would undoubtedly cause severe confusion and mischief in any medium-sized or large organization. At present, garnishments, like other legal process, receive immediate and responsible attention.

The proposal (Section 723.101(a)(1)) contemplates that a withholding order can be served by merely sending a first-class letter to "the managing agent or the person in charge at the time of service of the branch or office where the employee works ...". A first-class letter in a random envelope addressed to a specified individual would in many organizations remain unopened and await such particular person's attention, which practice could result in a delay of several days or even several weeks in the event of illness or vacation or absence of the particular party from the office on business.

Another situation that will occur in a medium-sized or large organization with changing and transferring personnel is that such a letter would probably be forwarded, unopened, on to the person particularly addressed who had transferred from a particular point of employment or who had left the employ of the particular company, again introducing an element of uncertainty and a considerable delay in the handling of the matter.

This provision further goes on to allow mailing by an ordinary first-class mail envelope addressed "to the office from which the employee is paid". Again, in a medium-sized or large organization such a letter would be received together with

many thousands of other pieces of correspondence on a particular day, and under ordinary circumstances the special handling required by such a notice would not be given by the employees who normally handle only routine correspondence and would be acted upon only when the matter was brought to the attention of the senior staff personnel.

The present procedure under Section 723.101, while allowing mail service, does require registered or certified mail. This procedure gives substantial dignity and importance to the particular item of mail received, and the section further protects the employer by providing that if the mail is not received a personal service has to be made. The proposed revision would transfer to the employer, who is certainly the innocent party in any question regarding a debt between the employee and his creditor, the obligation to prove that a particular piece of mail was not received. From a practical point of view, this burden of proving the negative places the employer in an impossible situation.

Considering the very slight cost of a certified or registered letter and in view of the fact that the probability of such a letter being lost or mislaid is substantially less than normal first-class mail, it would appear that no particular burden is placed on the creditor requiring certified or registered mail, and the use of certified or registered mail would certainly be a more efficient handling of an important matter, particularly under the existing statute, which places the risk and responsibility of service of the process on the creditor rather than the employer, who has no pecuniary interest in the matter.

The present statute, Section 723.101(a)(2), also allows a withholding order to be served on the agent for service of process. The identity of such a process agent can be obtained easily by a telephone call and the employer would be protected by the fact that such an agent for process is instructed and able to direct a withholding order (in similar manner as a summons and complaint) to the proper parties within the company he represents to avoid delay, misdirection or mishandling of the matter, to the mutual advantage of both the creditor and the employer.

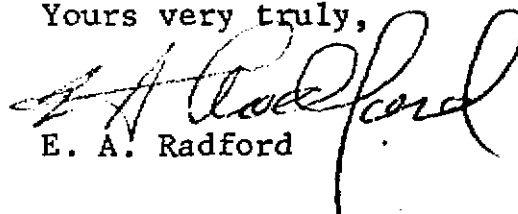
We suggest that, at the very least, service of an earnings withholding order on an employer of more than ten persons be served by registered mail and, if such employer is incorporated, served only on a person entitled to accept service of summonses and complaints as presently outlined in Section 723.101(a)(2), and that such service by registered mail should be deemed unaccomplished unless and until the creditor shall produce a return receipt that has been executed by the recipient or on its behalf by an authorized party.

California Law Revision Commission

3.

I would appreciate being advised of your further recommendations in connection with this matter.

Yours very truly,

A handwritten signature in cursive script, appearing to read "E. A. Radford", written over the typed name.

E. A. Radford



EXHIBIT 2

LOS ANGELES COUNTY CLERK
AND
CLERK OF THE SUPERIOR COURT

111 NORTH HILL STREET

MAILING ADDRESS: P.O. BOX 151
LOS ANGELES, CALIFORNIA 90053

JOHN J. CORCORAN
COUNTY CLERK

ROBERT J. SCHWARTZ
CHIEF DEPUTY

(213) 974-5101

January 25, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: John H. DeMouilly
Executive Secretary

Dear Mr. DeMouilly:

TENTATIVE RECOMMENDATIONS RELATING
TO IMPROVEMENTS IN EMPLOYEES'
EARNINGS PROTECTION LAW

We have reviewed the tentative recommendations as set forth in your proposal of November 30, 1978, regarding "Wage Garnishment Procedures" and would offer the following comments for your consideration.

We oppose the tentative recommendations because it will necessitate additional staffing and increased processing costs to our office. Further, in its present form, the proposal contains a procedural defect.

The Commission's stated purpose is to reduce spending by local government by removing the duties of the levying officer under the Employees' Earnings Protection Law (Chapter 1133, operative 7-1-79). However, those duties relating to the handling of exemption claims would not be eliminated but would merely be shifted to the County Clerk's office without provision for the imposition of any fee for those duties. It should be noted that a levying office is now reimbursed at a cost of \$8.50 per levy.


Approximately 10,000 writs of execution were issued county-wide by this office in 1978. Using figures provided by the Los Angeles Marshal's office, it is estimated that 80% or 8,000 levies were against earnings; that exemption claims were filed in 7% or 560 of those levies, and that hearings to determine

claims were set in 35% or 196 of the matters. It is, therefore, estimated that this additional workload of processing the claims of exemption would require approximately 750 additional manhours per year or a staffing increase of 1/2 position at the level of Intermediate Typist Clerk, at a cost of \$5,250.00 annually.

Additional expenses would be imposed on the County Clerk's office by way of costs for postage, internal forms (notices) and forms which are to be provided to the litigants and the employer without charge. These costs are estimated to be \$750.00 annually.

The procedural defect lies in the fact that the recommendation does not provide for any receipt or "return" (such as is presently made by the levying officer) to be filed with the Court which would indicate payments by the employer to the judgment creditor. Therefore, in issuing any subsequent earnings withholding order or writ of execution, there is no way for the clerk to ascertain partial satisfactions in order to verify the proper amount for which the order or writ is to issue. Complete reliance would have to be made on the application, which procedure is contrary to our present practice.

Very truly yours,


JOHN J. CORCORAN
County Clerk

JJC:WA:kb

Oficinas Legales - Law Offices

SOUTHEAST LEGAL AID CENTER

2650 ZOE AVENUE - THIRD FLOOR
HUNTINGTON PARK, CALIFORNIA 90255
Telephone: (213) 585-0464 / 639-7810

CELIA TORRES
DIRECTING ATTORNEY

January 29, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

RE: Tentative Recommendation relating to Improvements in Employee's
Earnings Protection Law, November, 1978

TO WHOM IT MAY CONCERN:

I am a staff attorney with the Southeast Legal Aid Center, a federally funded non-profit corporation which provides free legal services to indigent persons in civil matters in an area in the Southeast region of Los Angeles County containing a population of over 800,000.

During the past four years as an attorney with this program, I have handled a large number of wage garnishment cases. Based upon this experience, and on behalf of many persons who will be affected by changes in the wage garnishment procedure, I would like to offer the following comments regarding the Tentative Recommendation relating to Improvements in Employees' Earnings Protection Law proposed by the California Law Revision Commission.

I agree with the Tentative Recommendation that the use of first class mail for service of orders, notices, and other documents involved in the earnings withholding procedure is an acceptable method of service in that context, and should present no significant problems.

I also agree with the Tentative Recommendation that elimination of the levying officer from the earnings withholding procedure would be more efficient, and I believe that the basic concept is workable. But I have strong objections to some of the implementing provisions of the Recommendation, because the result will be to remove protections which the employee now has, and it raises serious constitutional questions.

Under the present procedure, the employee has 10 days from the date his earnings are withheld to file a Claim of Exemption (C.C.P. 690.50 (a)). Once the Claim is filed, the levying officer keeps possession of all earnings received until a final determination of the Claim Of Exemption (C.C.P. 690.50 (b)).

Thus the employee has an opportunity for a hearing on the Claim of Exemption before possession of his earnings has been transferred to the Judgment Creditor. The constitutionality of this procedure was upheld in the decision of Raigoza v. Sperl, 34 Cal. App. 3d 560 (1973).

However, under the Tentative Recommendation there is no mechanism to prevent the withheld earnings from being mailed to the judgment creditor even though the debtor has filed a Claim of Exemption. This problem also exists under C.C.P. 723.026 as previously enacted. As a result the employee will lose protections which now exist.

In addition to the constitutional issues presented, many practical problems will be introduced by this procedure. Unless the judgment creditor is totally cooperative, the employee would have to seek and enforce a contempt citation, losing time from work to make trips to court to recover his exempt wages. Unnecessary judicial time will be spent in this process. The employee would probably need an attorney to obtain and enforce the citation. Further, the judgment creditor may not be able to repay the money immediately. Thus, under this procedure, the employee will be put in the position of being a creditor of his own exempt wages.

In order to preserve the protections for the employee which now exist, and to avoid both constitutional and practical problems, I would suggest the following changes in the Tentative Recommendation:

(1) Change Section 723.105 (c) to require that immediately upon the filing of a Claim Of Exemption and financial declaration, the Court Clerk send an order to the employer, on a form prescribed by the Judicial Council, to hold all money withheld from the employee and to send no money to the judgment creditor pending further notice from the court.

This extra duty on the court clerk will involve only one additional mailing and is not an appreciable burden or expense.

(2) Change Section 723.025 to require the employer to wait 20 days after each withholding is made from the employee's earnings before paying over that amount to the judgment creditor. This will give the employee an opportunity to file a Claim of Exemption and for the court clerk to send the "hold-order" to the employer.

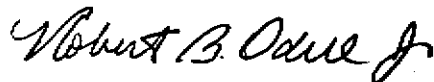
It should be noted that this delay is far less than currently exists in Los Angeles County where, in our experience, it takes from 30 - 60 days for money to be processed by the county before being released to the judgment creditor or the employee.

The above changes together with any minor conforming corrections, would retain the present protections for the employee's exempt earnings and would result in no significant expense or delay. And they would not only eliminate possible constitutional objections but also avoid the practical problems involved in attempting to recover exempt earnings from the judgment creditor.

Page 3 RE: Employee's Earnings Protection Law, November, 1978

If there are any questions regarding these comments, please let me know as I would be happy to discuss this matter further.

Respectfully submitted,

A handwritten signature in cursive script, reading "Robert B. Odell, Jr.", written in dark ink.

ROBERT B. ODELL, JR.,
Attorney at Law

WESTERN CENTER ON LAW AND POVERTY, INC.

3535 WEST 6th STREET
LOS ANGELES, CALIFORNIA 90020
TELEPHONE (213) 487-7211

JOHN E. McDERMOTT
EXECUTIVE DIRECTOR

PHILIP H. HENDERSON
ADMINISTRATOR

PATRICIA M. TENOSO
ROBERT F. OLMOS
SENIOR COUNSEL

January 29, 1979

John H. DeMouilly, Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMouilly:

The Western Center on Law and Poverty, Inc., welcomes the opportunity to comment on the proposed amendments regarding wage garnishment procedures. The Western Center is a non-profit back-up center funded by the Legal Services Corporation, which provides assistance to Legal Aid offices throughout California.

Inasmuch as Legal Aid clients represent a large proportion of that population which is affected by the wage garnishment statutes, we are extremely concerned that any change in these laws not redound to the detriment of the working poor. With that interest in mind, we submit the following comments:

I. Service by First-Class Mail

We endorse the use of first-class mail for sending all orders, notices, and documents, including earnings withholding orders. It is an inexpensive means of delivery involving no loss of efficiency.

II. Duties of Levying Officer

We are opposed to the proposed amendments which would eliminate the duties and functions of the levying officer. We foresee immense problems in having parties deal directly with each other, particularly in terms of accounting for amounts sent and received.

Where money has been sent directly to a judgment creditor by the employer, a debtor prevailing at an exemption hearing is placed in the position of having to recover the money from the creditor. Where the money is not returned voluntarily the court could presumably threaten the creditor with contempt, but new problems have been introduced. What if the creditor were a private individual who had spent the money? How does the unrepresented debtor get back into court to request a contempt order, and how much time would be lost from work going back and forth to court for these extra hearings?

Thus, by eliminating the levying officer as holder of the money, the debtor can become a "creditor" of his own exempt wages, and unless the judgment creditor is totally cooperative, he can be in a difficult and time-consuming position, possibly needing to get an attorney or go to small claims court to try to recover the money.

In essence, the proposed amendments result in taking the property of one litigant and delivering that property of the opposing litigant without any previous judicial finding that the opposing party is entitled to the property. This is a rather unusual proposal in civil law, which is usually very chary in terms of taking the property of one person and delivering it to another interested person without a prior judicial hearing. (See, Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Blair v. Pitchess, 5 Cal. 3d 258, 96 Cal. Rptr. 42 (1971); Mendoza v. Small Claims Court, 49 Cal. 2d 668, 321 P. 2d 9 (1958); §§ 512.010 et seq. Code of Civil Procedure).^{1/}

The Commission may be assuming that judgment creditors as a class are large financial institutions. Such creditors are stable, have the resources and expertise necessary to be familiar with their rights, duties and obligations under the proposed system and have adequate legal resources available to advise them regarding their duties.

^{1/}

Although the present exemption system has been found to comport with due process (Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptrs. 296 (1973)), if the garnished wages were delivered to a litigant rather than to a disinterested stake-holder such as the Marshal, the system could arguably be constitutionally infirm.

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If all judgment creditors were as described above, the Commission's proposal might be acceptable. However, a large proportion of judgment creditors are, for example, relatively unsophisticated small landlords who have represented themselves in litigation in pro per and have only the faintest idea of their rights, obligations and duties in the wage garnishment area. To deliver the wages of the working poor directly into the hands of such a judgment creditor would expose the debtor to the strong possibility that, either through ignorance or duplicity, the garnished wages would be disposed of prior to the time when a claim of exemption could be heard.

Possible Solutions

If the Commission remains convinced that the judgment creditor ought to act as the stake-holder in garnishment proceedings, then we make the following recommendations:

1. Change 723.025 to require the employer to wait for a period of 30 days after the employee's wages are first withheld before sending the first payment to the judgment creditor. This will give the debtor time to file the claim of exemption with the clerk.

2. Change 723.105 (a) to require the clerk to send to the employer notice that a claim of exemption has been filed and that no money should be sent to the judgment creditor until further notice. If no opposition is filed, then the clerk would notify the employer that withholding should be discontinued, and that all money should be released to the debtor immediately. If an opposition is filed, then after the hearing, notice of the judge's order would be sent by the clerk as set out in 723.105 (g).

This extra duty on the clerk involves only one additional mailing and is not an appreciable burden or expense. It would avoid all of the problems not now present that would arise if the debtor's claim were granted and the judgment creditor did not immediately return monies already sent to it by the employer. In addition, there would not be the delay now presented in Los Angeles County of some two months for the wages to be returned to the debtor or forwarded to the creditor.

3. Change 723.104 to require the employer to deliver to the employee a copy of the earnings withholding order within 10 days from service or at the time of the first withholding, whichever is earlier, and remove the exemption from civil liability for failure to do this.

4. In the alternative, the judgment creditor should be required to post bond. This would protect the judgment debtor against loss occasioned by malfeasance or misfeasance on the part of the creditor in the administration of the garnished wages.

For the reasons set forth above, we believe that the Marshal should be allowed to continue to act as the temporary depository of garnished wages.

The justifications offered by the Commission for the proposed change are that 1) the wages could be safely held by the judgment creditor without the use of a middleman (which we feel is an erroneous assumption), and 2) the present functions of the Marshal cost too much in light of Proposition 13. The Commission, however, does not give a gross figure as to the costs of the present system nor does it breakdown the various costs into the appropriate categories (e.g., the cost of having the Marshal serve the withholding order, the cost of processing the claims of exemption, the cost of temporarily holding the wages until the claim of exemption is decided, etc.)

To propose such a crucial change in the Employee Earnings Protection Law is fraught with risk without a detailed, comparative cost analysis. It invites disaster for the working poor without some consideration of the countervailing factors mentioned in the preceding paragraphs.

Thus, it is our conclusion that the best "solution" to the problems created by the proposed amendment is simply to leave the Marshal with his present function of middleman or stake-holder.

Thank you for your consideration.

Very truly yours,



PAT WILLIAMS
Staff Attorney

KENYON DOBERTEEN
Legal Aid Foundation of Los Angeles

ROBERT ODELL
Southeast Legal Aid Center



Marshals Association of California

100-37th Street, Room 130, Richmond, California 94805 (415) 231-3243

January 30, 1979

CHARLES IVERSEN
President

LOU JOHNSTON
First Vice President

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Second Vice President

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Secretary

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California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: Mr. John H. DeMouilly, Executive Secretary

Dear Sir:

The Marshals Association of California has reviewed your tentative recommendation relating to the Wage Earning Protection Laws.

The remedies which the commission describes as adequate to enforce the provisions of this proposal consist of (1) Citation for Contempt, and (2) Liability for abuse of process. While these remedies may prove to be adequate for the large Collection Agencies or corporate litigants, who have legal counsel readily available, they do not take into consideration the small business or the individual litigant who has little or no knowledge of the law or of court procedures.

The commission apparently is looking at the levying officer strictly as a bookkeeper. It should be noted that the levying officer's position is that of a neutral, disinterested, ministerial officer of the courts, whose interest is in the enforcement of the judgment of the court in a manner which protects the rights of all litigants, and that it is important that there be a neutral bookkeeper to keep track of all collections and to issue a timely release when the judgment is satisfied. This is especially true when there are multiple defendants on the same case and, as a result, there is more than one Wage Withholding Order in effect. Additionally, a writ of execution could be in the hands of the levying officer with sufficient funds under levy to satisfy the judgment, notwithstanding any wage withholding orders.

The proposal provides for Claims of Exemption on earnings to be filed directly with the court. Presently, such claims would be filed with the levying officer. The procedure would create separate procedures for the filing of such claims, one for earnings; and a different one for other types of exempt property. This would place an additional burden on the defendant to know what procedure to follow, especially in the case where the claim is for exempt earnings deposited in a bank account.

A levying officer who receives a Claim of Exemption under the present system, will hold any earnings collected under levy until the claim is determined to be exempt is returned to the debtor.

Under the proposed recommendation, the garnishee would continue to pay earnings withheld directly to the creditor. The proposal relies on the creditor's obedience to any subsequent order determining the money received to be exempt, and assumes that the creditor would return money so collected. While it may be reasonable to assume that a large collection agency or corporate creditor could be relied on to obey such an order, the proper or small claimant is less likely to do so. (I can't return it because I've already spent it!) Again assuming that the remedies of contempt or of abuse of process are adequate to force the return of the exempt earnings to the debtor, such procedures would not only increase the amount of litigation in the courts, but also could delay the return of the earnings to the debtor far beyond any delay presently caused by the levying officer.

By providing that the clerk receive and process Claims of Exemption, this proposal places additional manpower and training expenses on the courts with no provision for off-setting revenues. The levying officer will still require bookkeepers for processing the collection and disbursement of funds received from levies other than wage withholding orders. He will still be processing Claims of Exemption for property other than earnings, and will still require adequate staffing to accomplish these duties.

Although the levying officers' costs are not fully covered by the fee collected, and therefore, are partially borne by the taxpayer, this proposal would shift the burden of the costs of collection of civil judgments almost entirely from the litigants to the taxpayer.

Several duties which are presently the responsibility of the creditor to fulfill are shifted to the clerk. (ie. A judgment creditor wishing to contest a Claim of Exemption must file a notice of motion for an order determining the claim of exemption, give written notice to the levying officer, and serve a notice of hearing and a copy of the notice of opposition to the claim on the judgment debtor and the attorney for the judgment debtor and file proof of service with the court. Under the commission's proposal, the judgment creditor would file his notice of opposition to the claim with the clerk and the court clerk must set the matter for hearing, serve notice of the hearing on the judgment debtor and on the judgment creditor, and serve a copy of the notice of opposition to the claim on the judgment debtor and attorney for the judgment debtor.) These are duties which are presently NOT the responsibility of the levying officer or the clerk, and represent not merely a shifting of duties from one governmental agency to another, but additional costs to be borne by the taxpayer. The recommendation, instead of reducing spending by local government, would create additional costs to the courts and local government.

We therefore oppose the concept and the tentative recommendations as outlined.

Respectfully yours,


C. E. Iversen, President